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PAGE

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PAGE

INDEX

CITATIONS

Cases:

53207—38——1

Cases—Continued.

Miscellaneous—Continued. Page.

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 779

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

PHILIP L. GERHARDT

No. 780

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BILLINGS WILSON

No. 781

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JOHN J. MULCAHY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The *per curiam* opinion of the Circuit Court of Appeals for the Second Circuit (R. 233)[1] is reported in 92 F. (2d) 999. The findings of fact and opinion of the Board of Tax Appeals (R. 21–38) are reported in 34 B. T. A. 1229.

JURISDICTION

The judgments of the court below were entered on November 10, 1937 (R. 234–235). Petition for certiorari was filed February 10, 1938, and was granted on February 28, 1938. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the compensation received by the taxpayers for services performed during the respective years in issue, as employees of the Port of New York Authority, is exempt from Federal taxation on the ground that such a tax would be an unconsti-

[1] The case involves the tax liability of three taxpayers. Five proceedings were begun before the Board of Tax Appeals. The cases were there consolidated and heard together. Three petitions for review were filed in the court below, which for purposes of record, briefing, hearing, argument, and decision were consolidated (R. 231). Accordingly, a single petition for certiorari was filed in this Court. Two petitions for review were filed in the Circuit Court of Appeals for the Third Circuit, but it has been stipulated that decision in those cases will abide the final decision in the instant cases.

tutional burden on the States of New York and New Jersey.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra,* pp. 66–79.

STATEMENT

The facts, as found by the Board (R. 21–35), as stipulated by the parties (R. 130–162), and as disclosed by the annual reports of the Port of New York Authority (hereinafter called Port Authority), may be summarized as follows:

A. The Establishment of the Port Authority

The Port Authority is a bi-state corporation created by a compact agreed to by the States of New York and New Jersey on April 30, 1921[2] (R. 21, 130), and approved by the Congress of the United States, by Joint Resolution of August 23, 1921, c. 77, 42 Stat. 174 (R. 45, 130).

The Port of New York lies between the States of New York and New Jersey. It has long been recognized that a coordinated development of the port was necessary and that this could not be accomplished by separate action of the two states (R. 22–23). In 1917 a Joint Commission was authorized by the legislatures of the two States and appointed by the governors (R. 132), for the purpose

[2] Laws of New York, 1921, Vol. I, c. 154, p. 492; Laws of New Jersey, 1921, c. 151, p. 412.

of surveying the transportation facilities and port and harbor conditions (R. 22). This Joint Commission, after its survey, made a report to the legislatures of the two States in 1918, in which it recommended an interstate compact to provide a bi-state corporate agency to carry out a comprehensive port and harbor development under the direction of the two States (R. 23, 132, Ex. A.[3]). The Joint Commission, in cooperation with a bi-state legislative commission, made a subsequent report known as "Joint Report with Comprehensive Plan and Recommendations" (Ex. B). The report reviewed the increasing commerce of the Port, the inefficiency of its terminal facilities, and the resulting hardship on the eight million inhabitants of the district. It described the port problem as primarily a railroad problem and urged the adoption of an improvement plan comprising a complete reorganization of railroad terminal facilities, joint operation and connection of railway belt lines, pier improvements, the establishment of distribution stations, warehouses, highways, and the like. The Joint Report contained a suggested form for the compact and a comprehensive plan for the development of the Port (R. 22–23, 132–133). Thereafter the legislatures of New York and New Jersey authorized Commissioners, on the part of the respective States, to execute an agreement between the

[3] References to exhibits are to the original exhibits filed with the Clerk of this Court.

States, in the form set forth in the Acts of the respective States. This was done on April 30, 1921, and the compact approved by Congress (R. 133–134). Pursuant to Article X of the compact, the legislatures of the two States in 1922 adopted the Comprehensive Plan recommended by the Joint Commission (R. 134–135); New York, L. 1922, c. 43; New Jersey, L. 1922, c. 9. It was approved by Congress on July 1, 1922, c. 277, 42 Stat. 822 (R. 135; Ex. E., pp. 30–46).

The Comprehensive Plan provides in part as follows (R. 135):

> SEC. 8. The port of New York Authority is hereby authorized and directed to proceed with the development of the port of New York in accordance with said comprehensive plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state to effectuate the same, except the power to levy taxes or assessments * * *. The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effecting the pledge of the states in said compact, but it shall have no power to pledge the credit of either state or to impose any obligation upon either state or upon any municipality, except as and when such power is expressly given by statute, or the consent of any such municipality is given.

The compact, which recites that the objects sought are "a better coordination of the terminal, transportation, and other facilities of commerce in, about, and through the port of New York," confers upon the Port Authority the powers and jurisdiction stated, as follows (Ex. E, pp. 19–20):

> * * * to purchase, construct, lease, and/or operate any terminal or transportation facility within said district; and to make charge for the use thereof; and for any of such purposes to own, hold, lease, and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it (Art. VI).

and such additional powers as might thereafter be delegated to it by the legislatures of the two States or by Congress (Art. III).

Among the powers and restrictions imposed upon the Port Authority by the compact of April 30, 1921 (Ex. E; *infra,* pp. ——), are the following: (1) It shall not pledge the credit of either State (Art. VII). (2) The facilities of the Authority are expressly subject to the jurisdiction and control of the public utilities commissions of either State to the same extent as a private corporation (Art. VIII). (3) Any municipality within the port district retains full power to develop its own port and terminal facilities (Art. IX). (4) The Authority is to make plans for the development of the Port, but they must have the legislative approval of both States

before becoming effective or binding on them (Art. XI). (5) The Port Authority may petition the legislatures of the two States, Congress, interstate commerce, and public utility commissions with respect to matters within its jurisdiction (Arts. XII, XIII). (6) Until its revenues are adequate, the legislature of the two States shall appropriate equal amounts (up to $100,000 a year) for administrative expenses (Art. XV). (7) Subject to the authority of state and Federal law, the Port Authority may prescribe rules for the improvement of navigation and commerce, which are binding only on approval of the legislatures of both states (Art. XVIII). (8) The right by the governor to veto the action of any commissioner appointed from his State is reserved (Art. XVI). (9) The two States (rather than the Authority) shall have power to provide or impose penalties for violation of its rules and regulations (Art. XIX).

Under the provisions of the Comprehensive Plan (Ex. E) the contemplated projects were as follows: (1) Railroad tunnel or tunnels connecting the trans-continental railroad lines terminating in New Jersey with those terminating or having connections in Brooklyn and the Bronx (p. 36). (2) A vehicular bridge or tunnel across the Arthur Kill River, connecting New Jersey and Staten Island (p. 36). (3) A bridge or tunnel from New Jersey to Manhattan, connecting New Jersey railroads with Manhattan railroads and providing for trans-

portation of standard railroad cars into Manhattan (p. 37). (4) Some fifteen railroad belt lines, and terminal facilities, to be operated in connection with an automatic underground electric system serving Manhattan (p. 42).

B. The Operations of the Port Authority

During the taxable years here in issue, 1932 and 1933, the activities of the Authority were as follows:

1. THE OPERATION OF BRIDGES AND TUNNELS

The Arthur Kill Bridges, known as Goethals Bridge and Outerbridge Crossing, are interstate vehicular bridges; the Goethals Bridge is between Elizabeth, New Jersey, and Staten Island, New York, and Outerbridge Crossing is between Perth Amboy, New Jersey, and Tottenville, Staten Island, New York (R. 138). Construction of the bridges was begun in 1926 and completed in 1928 at a cost in excess of $17,000,000 (R. 138). These two bridges, from completion through the taxable years in issue here, were operated by the Authority. The resulting net income, after paying interest on funded debt but before transfers to reserves for debt retirement, was as follows (R. 138):

1928 surplus	$272,676.75
1929 deficit	23,340.21
1930 surplus	76,683.54
1931 surplus	40,673.37
1932 deficit	187,272.17
1933 deficit	295,534.46

In 1937, the deficit was $191,940.61 (1937 Report, pp. 40, 61).

The deficits during 1932 and 1933 were due, according to the Authority's Annual Reports, in part to "general business depression seriously affecting the gross revenues," but "the larger portion of this decrease" was "due primarily to a further reduction in toll rates on the competing Perth Amboy Ferry" (1932 Report, pp. 51, 52; 1933 Report, p. 51). See also the 1930 Report, p. 54.

These bridges were operated in direct competition with the Perth Amboy Ferry and the opening of the bridges forced the Perth Amboy Ferry to reduce its toll charges, and in 1932 the opening of the Bayonne Bridge forced a "further reduction in toll rates on the competing Perth Amboy Ferry" (1932 Report, pp. 51, 52).

The Tottenville and Elizabeth Ferries were both forced to reduce services after the construction of the two bridges (1929 Report, p. 46), and a ferry running between Carteret, New Jersey, and Staten Island, has gone out of business since the opening of these two bridges (1929 Report, p. 46).

The *George Washington Bridge* is an interstate vehicular bridge over the Hudson River between Fort Lee, New Jersey, and New York City. It was erected at a cost in excess of $57,000,000, and was completed in 1931 (R. 139). From completion through the taxable years in issue this bridge was operated by the Authority, with resulting net in-

come from operations, after deducting interest but prior to transfers to sinking fund reserves, was as follows (R. 140):

1931	$504,264.08
1932	1,473,363.61
1933	1,142,770.42

In 1937 the net income was $2,099,639.66 (1937 Report, pp. 35, 60).

This bridge, as are the Goethals and Outerbridge Crossing bridges, is in competition with privately owned ferries which it affects in operations and revenues (1926 Report, pp. 14–16; R. 174, 175–176).

The *Bayonne Bridge* is an interstate vehicular bridge over the Kill van Kull River, between Bayonne, New Jersey, and Port Richmond, Staten Island, New York. The bridge was opened to traffic on November 15, 1931, and was erected at a cost in excess of $13,000,000 (R. 140, 141). This bridge was operated by the Authority, through the taxable years in issue, with a resulting annual net surplus or deficit, after interest payments, as follows (R. 141):

1931 surplus[4]	$25,400.20
1932 deficit	101,466.11
1933 deficit	240,890.18

In 1937 the deficit was $298,917.07 (1937 Report, pp. 38, 61).

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[4] The surplus noted for the year 1931 resulted from the fact that interest on the funded debt of the bridge for that year was charged to the investment account, for the reason that the Port Authority did not regard the construction program as completed until the end of the year 1931 (R. 141).

This bridge, as are those previously mentioned, is in competition with privately owned ferries, affects their revenues and has reduced their traffic and earnings (R. 174, 175–176).

The *Holland Tunnel* is an interstate vehicular tunnel under the Hudson River between Jersey City, New Jersey, and the Borough of Manhattan, New York City, New York. It was constructed by the New York Interstate Bridge and Tunnel Commission and the New Jersey Interstate Bridge and Tunnel Commission acting as a joint Commission. The Holland Tunnel was operated for a number of years by that Commission after its completion. These two Commissions were merged with the Authority in 1930, which was thus vested by the States of New York and New Jersey with the control, operation, and maintenance of the tunnel (R. 144). It was operated from the time of its acquisition by the Authority at a net income, after deducting interest on the funded debt, as follows:[5]

1931	$3,031,987.89
1932	2,605,076.96
1933	2,440,987.15

In 1937 the net income was $3,762,798.65 (1937 Report, pp. 31, 59).

As in the case of the George Washington, Bayonne, and Arthur Kill bridges, the operation of the Holland Tunnel by the Authority is in direct

[5] The data are taken from the Annual Reports: 1931, p. 74; 1932, p. 74; 1933, p. 76.

competition with privately owned ferries across the Hudson River and has compelled the private ferries to reduce their toll charges and revenues (R. 174, 175–176).

The *Lincoln Tunnel.* This is an interstate vehicular tunnel from Weehawken, New Jersey, to 38th Street, New York City. Construction was commenced in 1934; the first tube was opened on December 22, 1937, and the second will be completed in 1940. The estimated cost of the first tube was $37,500,000; the total cost will be about $82,500,000[*] (R. 146; 1937 Report, pp. 28–29, 43). For the ten days of 1937 in which the single tube was in operation, the tunnel had a gross income of $38,246.25, operating expenses of $19,519.99, and, after deducting interest, a net deficit of $16,666.41 (1937 Report, p. 33).

This tunnel also competes with privately owned ferries and will result in a loss of revenues to these ferries (R. 174, 175–176).

As to all bridges and tunnels, the Port Authority maintains a uniformed police force by authorization of the states (R. 26). The Authority has

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[*] Respondents emphasize that the Federal Public Works Administration contracted to purchase $29,100,000 of the Port Authority bonds issued to finance this tunnel after the Administrator "insisted upon being furnished with opinion of bond counsel of his own choosing" that the bonds were tax-exempt (Br. in Opp. 5). The Board found that the Administration "required and received the opinion of the Port Authority's general counsel that its notes were exempt from state and federal taxation" (R. 27).

sought to increase the use of these facilities by advertising in magazines, trade journals, and public places (Ex. S).

2. INTERSTATE BUS LINE

Since March 1, 1931, and through the taxable years in issue, the Authority has owned and operated with its own personnel an interstate bus line from Elizabeth, New Jersey, Port Richmond, Staten Island, and New York, over the Goethals Bridge (1934 Report, pp. 38, 39). The bus operation was commenced in 1931. Its operating deficit and surplus through the taxable years, and including 1937, have been as follows (1937 Report, p. 40):

1931 deficit	$9,000.25
1932 deficit	3,747.60
1933 deficit	1,749.81
1937 surplus	604.47

3. COMMERCE BUILDING AND INLAND TERMINAL NO. 1

As a part of the Port Authority's plan to coordinate transportation facilities and to reduce congestion, it has long planned to build a system of inland freight terminals: The Port Authority Commerce Building and Inland Terminal No. 1 was erected in 1932. No other freight terminal has been constructed. The building covers an entire block in New York City and is fifteen stories in height (R. 27–28, 151, 166). Thirteen floors of the building are devoted to commercial purposes. The street level floor and the basement are devoted to the purpose of the Inland Terminal and one floor,

the second, has been devoted to exhibit purposes (R. 166). A portion of the street level floor is used as store area devoted to the conveniences of the building, on which are located a barber shop, a beauty shop, a cafeteria, a United States post office, and a bank, all of which are operated by commercial concerns except the United States post office, and all pay rents to the Authority for the space which they occupy (R. 166). The space in the Commerce Building is divided as follows (1930 Report, p. 44; R. 166):

	Square feet
Office space	152,940
Manufacture and loft space	1,842,000
Freight terminal purposes	282,650
Stores	112,260

The upper floors of this building are constructed in such manner as to be suitable for rental and occupancy for manufacturing, office, and industrial business uses (R. 151). The Authority, in the operation of the Commerce Building and Inland Terminal No. 1, through rental agents, solicited and procured tenants for the building (R. 166–167). The building is 95 per cent rented (R. 201). The Authority has carried on an active and extensive campaign in advertising the building in order to secure tenants (Ex. Q), in which it represented that while the building was designed primarily for industrial uses, it also had the advantages of an up-to-date office building (Exs. Q, P, A, N; R. 170–172). In the operation of the building the Authority comes into direct competition with the opera-

tion of privately owned buildings (R. 169). Revenue derived from the non-terminal portion of the building annually produces more income than that portion of the building devoted to the Authority's uses (R. 166).

The building has no physical connection with any railroad facilities, nor with any dock, pier, wharf, or other marine facilities. All of the freight, both incoming and outgoing, is handled by trucks (R. 171). The basement of a large portion of this building was leased to eight railroads for use as a transfer terminal for a period of five years with options to renew the leases for nine additional five-year periods. The basement of the building is occupied and used by the Railway Express Agency (R. 182–183). During the taxable years the Terminal operated at only a small fraction of its capacity of 680,000 tons (R. 166, 182), handling between fifty and seventy thousand tons a year (R. 182). In 1937 it handled about 75,000 tons, while the Express Agency handled about 110,000 tons. (1937 Report, p. 50.)

The Commerce Building and Inland Terminal had a gross income of $1,235,160.82, and after paying interest and operating expenses, a net income of $82,571.57 in 1937 (1937 Report, pp. 50, 62).

4. FINANCIAL SUMMARY

All of the income, revenues, and receipts of the Authority have been derived from the following sources: (a) Toll charges from bridges and tun-

nels;[7] (b) rentals of Inland Terminal No. 1, paid by the railroad carriers; (c) income received from rentals received from the upper floors of Inland Terminal No. 1; (d) rentals derived from real estate purchased but not yet devoted to uses in connection with the Comprehensive Plan; (e) interest from investments of sinking reserves and other funds; (f) revenue from operation of bus line over Goethals Bridge; (g) interest on bank balances; and (h) miscellaneous income, such as rental of telephone ducts, sales of gasoline, tire changes, and advances by the States, made under the provisions of the compact and Comprehensive Plan, until the time the Port Authority became self-sustaining (R. 319).

During the taxable years in issue and in 1937 the net income from the operation of the Authority's facilities were as follows (R. 32):

	1932 (74)[1]	1933 (75)	1937 (59)
Operating revenue (tolls, etc.)	$6, 197, 799. 49	$9, 755, 245. 91	$13, 667, 463. 87
Net income	2, 605, 076. 96	3, 112, 953. 78	5, 502, 448. 18

[1] Figures in parentheses indicate page in respective Annual Report where figures are found

The facilities constructed and operated by the Authority were financed principally by bond issues. Approximately 90% of the funds needed by the Authority were provided by such issues. The

[7] All bridges and tunnels owned and operated by the Authority at all times up to and including the present time exact the payment of a toll charge by vehicles using them (R. 319).

financing afforded by the States of New York and New Jersey was approximately 10% of the Authority's needs and such sums as were advanced by the two States were not invested by the States in the enterprise, but were merely loaned to the Authority and must be repaid to the two States (R. 31, 146–147).

The amounts derived by the Authority for its several projects by advances from the States or by bond issues are as follows:

	States loan	Bond issue	
Arthur Kill Bridges	$4,200,000	$14,000,000	(R. 291, 292.)
George Washington Bridge	9,800,000	50,000,000	(R. 295.)
Bayonne Bridge	4,100,000	12,000,000	(R. 298.)
Holland Tunnel	None	50,000,000	(1931 Annual Report, p. 57; 1932 Annual Report, p. 54.)
Commerce Building and Inland Termina	None	16,000,000	(1931 Annual Report, p. 57; 1932 Annual Report, p. 54.)
Total	18,100,000	142,000,000	
Add: Midtown Tunnel construction	400,000	37,500,000	(R. 306–307, 308.)
Total	18,500,000	179,500,000	

All of the operating revenues and tolls of the Port Authority derived from its various facilities are specifically pledged as security for the payment of its outstanding bonds and obligations, which pledge constitutes a lien upon such revenues and tolls (Ex. E, pp. 49, 73, 296; 1931 Report, pp. 57–58). The Port Authority has authority under the compact to mortgage its facilities and other property now held or to be acquired by it if it so desires (Art. VI).

C. Port Development

The operations and activities of the Port Authority during the years in question were in connection with its bridge, tunnel, and terminal facilities. It has not undertaken any projects to develop the harbor of New York in any way. It has never dredged a channel and has no dredges or facilities to do so (R. 226). It neither owns, leases, operates, nor has it constructed or improved for its own use any piers, docks, wharves, slips, or pier terminals (R. 226). It does not own or operate any tugs, barges, or marine equipment which could be used for the improvement or conduct of navigation (R. 226–227). It has established no harbor markings, buoys, lights, bells, or any other means for improving navigation, nor has it issued rules or regulations affecting navigation or commerce, except for lights in connection with its own bridges (R. 227).

The Port Authority has, however, extensively studied the marine, railway, and highway traffic problems (R. 27, 30), although its plans for an automatic underground system and for belt line railways have been abandoned or held in abeyance (R. 29, 30). It has cooperated with the State Dock Commission in its study of long piers, prepared reports on the location of free ports, advised municipalities in the district on port development, and has participated in actions before the Interstate Commerce Commission affecting the port (R. 62–

30). It cooperates with but does not supplant the efforts of states, municipalities, and agencies such as the Chamber of Commerce, Produce Exchange, and Maritime Exchange (R. 30).

The Authority has induced the Federal Government to keep the harbor clear of ice, and to promulgate regulations as to the storage of explosives. It has itself promulgated regulations concerning the storage period of freight on railroad piers (R. 30).

The Authority's Annual Reports for the taxable years in issue show that the Port Authority expended in these activities the following sums: $189,575.35 (1932 Report, p. 86); $138,610.75 (1933 Report, p. 84). It does not appear that any part of these funds expended by the Port Authority during the years in question was used to pay any part of the compensation of the respondents.

D. In General

There is no provision or saving clause in the compact, comprehensive plan or any of the statutes of either State dealing with the Port Authority which provides for its final liquidation or dissolution, or for the reversion of its properties and facilities to either or both of the two States.

The Authority is expressly prohibited from levying any taxes or assessments (Ex. E, p. 43). All penalties for violation of its rules for its facilities must be enacted by the legislatures of the two States and must be enforced in the regularly established courts of the two States (Compact, Art.

XIX). All transportation facilities of the Port Authority are expressly subject to regulation by the Public Service Commission of both States to the same extent "as if such * * * facility were owned, leased, operated, or constructed by a private corporation" (Compact, Art. VIII).

All of the bridges and tunnels owned and operated by the Port Authority are interstate in character and hence are subject to the power of Congress over such commerce under the Constitution of the United States. The rules and regulations of the Port Authority as to its bridges and tunnels over navigable waters are expressly made subject to the power of Congress over such facilities (Compact, Art. XXII).

E. The Taxpayers

The three taxpayers, during the taxable years in issue, were employees of the Authority (R. 160–161, 176, 224–225). The taxpayer Gerhardt was employed with the title of Industrial Consultant at a salary of $8,500 a year and during the taxable year, 1933, received a salary of $8,137.50 (R. 34, 160).

The taxpayer Wilson was employed as Assistant General Manager of the Authority and received a salary of $14,625 for the taxable year, 1933 (R. 34–35, 176).

The taxpayer Mulcahy was employed by the Authority during the taxable year, 1932, as Assistant General Manager of the Authority and received a salary of $10,950 for that year (R. 35, 224–225).

The three taxpayers are citizens of the United States and residents of New York (R. 105, 113, 121).

F. The Proceedings Below

The Board of Tax Appeals held (R. 35–38) that the Authority was engaged in the performance of a sovereign function of each of the two States of New York and New Jersey and that the compensation received by the three taxpayers during the taxable years in issue was constitutionally immune from a federal income tax.

The court below, in a *per curiam* opinion, affirmed the decisions of the Board of Tax Appeals on the authority of *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515 (C. C. A. 2d); *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401; and *Brush* v. *Commissioner,* 85 F. (2d) 32 (C. C. A. 2d).[8]

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the functions exercised by the Port of New York Authority during the years in question were governmental functions of the States of New York and New Jersey.

2. In failing to hold that in the operation of its several facilities the Port Authority was perform-

[8] Petitioner is of opinion that *Brush* v. *Commissioner,* 300 U. S. 352, was intended by the court below as authority, since *Brush* v. *Commissioner,* 85 F. (2d) 32, was reversed in that case.

ing proprietary functions of the States of New York and New Jersey.

3. In holding that the Port Authority functioned as an agency of the States of New York and New Jersey in the exercise by those States of their sovereign powers.

4. In failing to hold that since the Port Authority functioned under a compact between the States of New York and New Jersey, subject at all times to the consent of the Federal Government, the Port Authority was not engaged in the performance of sovereign functions of the two States such as to be immune from taxation.

5. In extending the principle of tax immunity to state functions in the field of interstate commerce, supreme authority over which has been granted to the Federal Government under the Constitution.

6. In holding that the compensation received by the taxpayers for services rendered during the taxable years in issue as employees of the Port Authority was constitutionally immune from Federal income tax.

7. In affirming the decisions of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

This case presents the single question whether the federal government may constitutionally impose a tax upon the compensation of employees of the Port of New York Authority. The answer must be in the affirmative for any of three reasons.

The activities of the Port Authority are proprietary in nature and are not such that federal taxation would violate "the necessary protection of the independence of the national and state governments within their respective spheres." *Helvering* v. *Powers,* 293 U. S. 214, 225.

The Port Authority is a separate corporation, holding its property and disposing of its revenues without reference to the ordinary governmental machinery of either State. It is a gigantic enterprise earning millions of dollars of annual revenues from the tolls which it charges to the general public for using its bridges and tunnels, and from the leases of space in its Commerce Building and Inland Terminal. In 1933 the Port Authority had a gross income of over $14,000,000 and a net income, after payment of interest, of more than $5,500,000.

In *Helvering* v. *Powers, supra,* this Court held that the operation of an elevated railway was not an essential governmental function. There is no reason to distinguish the transportation facilities there held to be taxable from those furnished by the Port Authority. *Brush* v. *Commissioner,* 300 U. S. 352, and *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, dealt with activities which owed their immunity to the fact that they were necessary auxiliaries to truly governmental functions. Neither in the *Powers* case nor in the case at bar

are the governmental functions of the state dependent upon the transportation activities in question.

It may be that certain of the Port Authority's activities relating to the development of the port might be said to be governmental in character, but these functions constitute an almost negligible proportion of the activities of the Port Authority.

In *Helvering* v. *Therrell,* No. 128, this Term, the Court described the activities which were exempt from taxation as those "which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution." Neither by this definition nor by the others which this Court has suggested can it be said that the employees of a great revenue producing enterprise such as the Port Authority should be exempted from a non-discriminatory federal tax.

The large volume of revenues which otherwise would be carved out of the field of federal tax sources should be decisive that the Port Authority and its employees are not to be held exempt. *Helvering* v. *Powers,* 293 U. S. 214; *South Carolina* v. *United States,* 199 U. S. 437. The Port Authority in 1937 had a gross revenue of more than $14,000,000. These revenues are gained in competition with private enterprise, and are accompanied by a comparable decrease in the taxable income derived by the private ferries operating in competition with the bridges and tunnels of the Port Authority.

II

The Port Authority has no immunity from Federal taxes since it was created by and operates under a compact between the States of New York and New Jersey which was effective only because approved by an act of Congress.

The Constitution forbids the states from entering into compacts without the consent of Congress. This clause carries into the Constitution the practice of the colonies. Their formal agreements required royal approval before they became effective. This colonial practice was translated into Article 6 of the Articles of Confederation, forbidding the states to enter into any treaty or alliance without the consent of Congress. This clause, in turn, plainly was the model for the provision in the federal constitution. It results that, with the sole exception of the two-year period between the Declaration of Independence and the ratification of the Articles of Confederation, throughout the three and one-quarter centuries of American history the states and colonies have been incompetent to enter into agreements with each other except with the approval of the central authority. This, we submit, means that under the Constitution, the compact, in which the states and Congress each have participated, is something much more than state legislation alone.

The decisions of this Court indicate that the approved compact has, for many purposes, the status

of an act of Congress. *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518, 566; *Wedding* v. *Meyler*, 192 U. S. 573, 581. Such, too, is the conclusion which must be reached when it is considered that only the act of Congress consenting to the compact breathes life into the tentative legislation of the states which otherwise would be nugatory.

Whether or not a compact has the status of an act of Congress, the plain fact remains that Congress has participated in the legislation by which the Port Authority was created. Whatever be the description of the resulting legislation, Congress plainly had an absolute power to determine whether or not the Port Authority should be created. Indeed Article 3 of the Compact implies that Congress has authority to confer additional powers upon the Port Authority.

The reason for the rule of intergovernmental tax immunity "is found in the necessary protection of the independence of the national and state governments." *Helvering* v. *Powers*, 293 U. S. 214, 225. This reason marks the limit of the exemption. "Springing from that necessity, it does not extend beyond it." *Board of Trustees* v. *United States*, 289 U. S. 48, 59. There can, therefore, be no claim of tax immunity in connection with compensation paid by a corporation which not only has no necessary independence of Congress but which was created only by virtue of an Act of Congress.

III

The operations of the Port Authority are almost exclusively within the field of interstate commerce. Over this field Congress has paramount and plenary power. There can, therefore, be no claim that the Constitution assures the Port Authority an independence of the United States such that the taxing power may not reach it.

The compact itself subjects to the power of Congress the rules and regulations to be proposed by the Port Authority to the legislatures of the States. The Congressional consent expressly reserves the full jurisdiction of the United States. The comprehensive plan, under which the Port Authority operates, was approved by Congress by legislation which expressly reserved all authority of the United States and its officers, and expressly required that bridges, tunnels, and other structures built across navigable rivers receive the approval of the Chief of Engineers and the Secretary of War.

The interstate bridges could be constructed only with the consent of Congress. In each of the acts creating consent, the Act of March 23, 1906, was made applicable. Under this Act the location and plans of the bridges must be approved by the War Department. The Secretary of War may prescribe the toll rates and may alter or remove the bridge if it be an unreasonable obstruction to navigation.

The remaining facilities of the Port Authority are equally subject to the constitutional power of

Congress. This means that the Port Authority itself is fully subject to the Congressional power to regulate interstate commerce. *Minnesota Rate Cases,* 230 U. S. 352, 399. While the state has full constitutional power to carry on these activities, they remain at all times subject to the full power of Congress.

The income tax upon the respondents is not, of course, an exercise of the power to regulate interstate commerce, but the reason for any tax exemption is that it is necessary to protect the independence of the state or national government. An activity which, by definition, is fully subject to congressional power has no independence to be protected by the granting of tax exemption. No decision in the entire field of tax immunity could be more anomalous than one which, extending the doctrine far beyond its present outposts, held the United States incompetent to tax the respondents because of the possibility that such a tax might burden or destroy an activity as to which Congress under the commerce clause has unquestioned and plenary power to burden or destroy.

ARGUMENT

This case presents the question whether the Federal Government may constitutionally impose a tax upon the compensation of employees of the Port of New York Authority. In *James* v. *Dravo Contracting Co., Mason* v. *Tax Commission,* and *Ryan* v.

Washington, Nos. 3, 7, and 8, this Term, the Government raised the question whether any non-discriminatory tax could be considered a threat to our dual system of government, when applied to a private person whose only claim of immunity rested on the fact that he dealt with the Government. But in the three cases then under consideration, as well as in *Helvering* v. *Therrell,* No. 128, this Term, and the related cases,[9] the Government took the position that reexamination of the cases such as *Collector* v. *Day,* 11 Wall. 113, was there unnecessary.

Similarly, we are of the view that the present cases are not such that we should ask for a reexamination of the cases which hold or assume that the preservation of our dual system of government requires that the employees or officers of the central and state governments be exempted from a nondiscriminatory tax imposed by the other sovereign. This is the case, we submit, because whatever the conclusion on that question, here: (1) the activities of the Port Authority are proprietary in character and are not an essential governmental function; (2) the Port Authority is not created by the States alone, but exists only by virtue of the Act of Congress approving the compact; and (3) the activities of the Port Authority are in interstate commerce and are subject to the paramount power of

[9] *Helvering* v. *Tunnicliffe,* No. 129; *McLoughlin* v. *Commissioner,* No. 287; *Helvering* v. *Freedman,* No. 597, this Term.

Congress, so that the reason for tax immunity does not exist.

Before discussing these propositions, it should be observed that the issue before the Court is solely one of constitutional interpretation. Section 22 of the Revenue Act of 1932, here involved, contains no exemption of government salaries.[10] Article 643 of Treasury Regulations 77, *infra,* as amended, provides that the compensation for services rendered to a state shall be included in gross income "unless such compensation is immune from taxation under the Constitution."

I

THE ACTIVITIES OF THE PORT AUTHORITY ARE PROPRIETARY IN NATURE

The basic principles applicable to this question are well settled. There is no immunity from taxation unless the compensation be given for services performed for the State in connection with activities of a nature such that federal taxation would violate "the necessary protection of the independence of the national and state govern-

[10] The earlier Revenue Acts exempted the "compensation of all officers and employees of a state or any political subdivision thereof." (Sec. II (b), c. 16, 38 Stat. 114; Sec. 4, c. 463, 39 Stat. 756; Sec. 201 (a), c. 63, 40 Stat. 300.) However, since the Revenue Act of 1918 there has been no comparable provision, Congress having left "the constitutional question as to the authority of Congress to tax certain salaries to be settled by the courts * * *." (S. Rep. No. 617, 65th Cong., 3d Sess., Pt. 1, p. 6.)

ments within their respective spheres." *Helvering* v. *Powers,* 293 U. S. 214, 225; see *South Carolina* v. *United States,* 199 U. S. 437; *Ohio* v. *Helvering,* 292 U. S. 360, 368–369. The question for decision is whether the activities of the Port Authority are such essential governmental functions.

This question cannot be answered by formula, but must be a judgment drawn from the facts and circumstances of the actual activities of the Port Authority. "By definition precisely to delimit * * * 'essential governmental duties' is not possible. Controversies involving these terms must be decided as they arise, upon consideration of all the relevant circumstances." *Helvering* v. *Therrell,* No. 128, this Term (pamph., p. 4). The circumstances of the activities of the Port Authority demonstrate, we submit, that they are predominantly proprietary in nature.

1. At the outset, it is to be noted that the Port Authority is not the states themselves. It is a separate corporation, without capital stock. It holds all of its property in its own name,[11] and its revenues belong to it alone, subject to an unexercised power in the States to direct the disposition of sur-

[11] This statement is to be qualified by the fact that technical fee title to the Holland Tunnel probably vests in the States of New York and New Jersey. The Acts of 1930 (N. Y., L. 1930, c. 421, sec 5; N. J., L. 1930, c. 247, sec 5) reserve their right, title and interest to the tunnel, land and property. However, the Acts of 1931 (N. Y., L. 1931, c. 47; N. J., L., 1931, c. 4) require the Port Authority to repay to the states their contributions to the construction of the tun-

plus revenues (N. Y., L. 1931, c. 48; N. J. L. 1931, c. 5). Its commissioners are appointed by the governors of the two states, and are subject to removal by the governor or senate, but the Authority functions as an entity wholly separate from the state, and its operations are subject to no control by the executive branch of either State.

It is probable that this separate character of the Port Authority was primarily compelled by the need for joint state action (see preamble to the compact creating the Authority, *infra,* p. 72). But it is not without significance that its activities are considered so far removed from the traditional governmental functions of the two states that a separate corporate entity was created to perform them without reference to the normal governmental functions of either State.

2. The implications of this separate organization are more than borne out when the nature and extent of the Port Authority's activities are considered. Ignoring for the moment that small part of the activities which may be taken to be governmental in character, the Port Authority is seen to be a gigantic enterprise with millions of dollars of annual revenues, chiefly realized by what is essentially the sale of transportation service to the consuming public.

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nel and, when this is done, vests in the Port Authority "the control, operation, tolls and other revenues" of the tunnel, with full power to use and to pledge the revenues for any purpose of the Authority.

The volume and distribution of these activities can best be seen from the following table, summarizing the operations for the year 1937: [12]

Facility	Gross Income	Net Income (After Payment of Interest)
Holland Tunnel	$7, 282, 282. 10	$3, 762, 798. 65
George Washington Bridge	4, 682, 148. 61	2, 099, 639. 66
Lincoln Tunnel	38, 246. 25	[1] 16, 666. 41
Bayonne Bridge	260, 858. 13	[1] 298, 917. 07
Arthur Kill Bridges	486, 370. 67	[1] 191, 940. 61
Inland Terminal No. 1	1, 235, 712. 46	82, 571. 57
Other Sources	(Not given)	64, 962. 39
Total	14, 050, 580. 61	5, 502, 448. 18

[1] Indicates a deficit.

This gross income of over $14,000,000 was chiefly derived from the tolls collected from the 22,622,316 vehicles which in 1937 used the Port Authority's interstate vehicular crossings (1937 Report, p. 62). The net income of over $5,500,000 was used wholly to built up debt retirement and other reserves.[13]

It needs no argument to show that here we have an enterprise which is earning profits on a grand scale. True, the profits are being used to accumu-

[12] The table is derived from the Seventeenth Annual Report of the Port of New York Authority, December 31, 1937, pp. 42, 59–62.

[13] It was disposed of as follows (1937 Report, p. 42):

Sinking Fund, Holland Tunnel	$1, 500, 000. 00
Sinking Fund, George Washington Bridge	1, 500, 000. 00
Statutory Reserve Fund, George Washington Bridge	599, 639. 66
Sinking Fund, Inland Terminal No. 1	82, 571. 57
General Reserve Fund	2, 314, 361. 90
Insurance Reserve Fund	13, 399. 14
Operating Reserves (Deficits)	507, 524. 09
Total	5, 502, 448. 18

late reserves for debt retirement and for new construction. True, the basic purpose of the Port Authority is not to earn money but to improve transportation facilities. Neither of these circumstances alters the plain fact that the Authority is conducting a business enterprise—a business obviously "affected with a public interest" but one which nonetheless earns and accumulates handsome profits from its transactions with the general public.

Some of these activities respondents hardly will deny to be proprietary in nature. The operation of a bus line (*supra,* p. 13) cannot, under *Helvering* v. *Powers,* 293 U. S. 214, be thought to be governmental in character. The Commerce Building and Inland Terminal No. 1, at least as to the thirteen floors devoted to commercial leases, which are solicited by realtors and advertising (*supra,* p. 14), seems equally clearly to be of a proprietary character. The two floors devoted to the purpose of a freight terminal and to the use as a Railway Express Agency station are more closely related to the basic purpose of relieving traffic congestion in the district. But they, fully as much as the upper floors, constitute business space leased to private persons for an annual rental, the Port Authority operating in this regard just as a private landlord.

The most serious question arises with respect to the great bridges and tunnels operated by the Port Authority. They produce large revenues and

profits. The Authority has made efforts to increase the traffic on its bridges and tunnels by advertising in magazines, trade journals, and public places (Ex. S). On the other hand, it may be admitted that a basic purpose of the Port Authority's creation and of the operation of the bridges and tunnels is not to earn profits but to facilitate the flow of traffic through the district.

The Government submits that the question of tax immunity must turn upon the actual operations and not the underlying purpose of the activity. The legislature when it incorporates a privately owned public utility does so in order that its citizens may have transportation, light, or fuel. This public interest in the results of the utility's operations does not give to it the immunity of the sovereign. Similarly, when the state or city itself operates a transportation system, the basic purpose is not to produce revenue but to provide for the transportation needs of the community. But since "the State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is * * * distinct from the usual governmental functions," the business does not have immunity from taxation. *Helvering* v. *Powers*, 293 U. S. 214, 227.

In *Helvering* v. *Powers* this Court unequivocally held that the operation of an elevated railway, whether temporarily or in perpetuity, was not an essential governmental function. There is no

ground whatever to distinguish the transportation facilities furnished passengers in the *Powers* case and the transportation facilities furnished vehicles by the Port Authority. In each case the service is of a nature such that it has been and is being furnished alternatively by a government or by private persons. In each case the transportation service is designed to fill a public need. In each case large revenues are realized by transactions with the general public.

Respondents in the earlier proceedings in this Court did not attempt to distinguish the *Powers* case, but stated merely that *Brush* v. *Commissioner,* 300 U. S. 352, and *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, should have dissipated the Government's misconceptions as to the effect of the *Powers* decision (Br. in Opp. 22). If this means that the *Powers* case has in any way been overruled or modified, the contention is baseless. The *Brush* opinion stated (p. 373) merely that the *Powers* case was not in point. The *Rogers* opinion did not even cite the *Powers* case. The *Powers* case was, on the other hand, definitely reaffirmed on February 28, 1938, when this Court in *Helvering* v. *Therrell,* No. 128, held that persons employed by the states and engaged in the liquidation of insolvent banks and insurance companies were subject to the federal income tax. The Court said (pamph. p. 5):

> *Helvering* v. *Powers, supra,* ruled that the compensation of members of the Board of Trustees of the Boston Elevated Railway

> Company was subject to the federal income tax notwithstanding they were appointed by the Governor of the State, confirmed by the Council, and endowed with large powers to regulate and fix fares, etc. "The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity."
>
> The cases last referred to strikingly illustrate the outcome of efforts here to apply the recognized doctrine in respect of taxing State agencies. According to them and others of like nature due weight, we are unable to conclude that the Commissioner erred * * *.

Neither the *Brush* nor the *Rogers* case deals with an activity primarily consisting in furnishing transportation to the general public, as was the question presented in the *Powers* case and is in cases at bar. In the *Brush* case the activity of supplying water was such that had it been abandoned, "in a very real sense * * * the city itself would then disappear." The maintenance of an adequate water supply was held to be a "necessary auxiliary" of almost all of the city's governmental activities, "and, therefore, partakes of their nature" (p. 371). The *Rogers* case held that the Panama Railroad Company, operating a railroad, steamships, two hotels, and a dairy, functioned chiefly as an adjunct to the management and operation of the Panama Canal (p. 404). The manage-

ment and operation of the Canal are "governmental functions," authorized by laws "well within the constitutional power of Congress to provide for the national defense and to regulate commerce. * * * Such being the status of the Canal, it requires no argument to demonstrate that all auxiliaries primarily designed and used to aid in its management and operation, and which have that effect, partake of its nature" (p. 406). Each of the cases thus dealt with activities which owed their immunity to the fact that they were necessary auxiliaries to truly governmental functions. Such is not the case here; the governmental functions of neither state are dependent upon the transportation activities of the Port Authority as a necessary auxiliary.

3. We have so far ignored the inconsiderable portion of the Port Authority's activities which deal with the development of the port. These have been summarized (*supra,* pp. 18–19) and may be said chiefly to consist of study of traffic problems, planning traffic flow, and consultation and advocacy with respect to the traffic and maritime interests of the port district, and one regulation relating to the storage period of freight.

It is unnecessary to decide which of these activities is governmental in nature. Even if it be assumed that they all involve the exercise of essential governmental functions, the fact remains that they constitute an almost negligible portion of the activities of the Port Authority. During the tax-

able years in question the total expenditure of the Port Authority on these activities was, in 1932, only $189,575.35,[14] and during 1933 was only $138,610.75.[15] This means that of the gross income de-

[14] 1932 Annual Report, p. 86; Table No. 22:

Expenditures for effectuation of comprehensive plan year ended December 31, 1932

Project	*Amount*
Belt Lines, General	$1,630.59
Belt Line No. 1	22,200.68
Belt Line No. 13, General	1,097.68
Channels, Bridges, and Anchorages	15,089.73
Food Distribution, Marketing Research Council	1,082.36
Food Receiving Terminals and Food Distribution	708.75
Development Work, Port District	93,403.06
I. C. C. and State Commission Cases	13,287.56
Inland Terminals and Movement of Freight by Motor Trucks	8,657.62
Jersey City Marine Terminal	5,500.00
Suburban Transit	13,470.75
Terminal Operations, General	5,644.73
Traffic Rates and Regulations	7,762.49
Brooklyn–New Jersey Ferry	39.35
Total	$189,575.35

[15] 1933 Annual Report, p. 84; Table No. 17:

Expenditures for effectuation of comprehensive plan year ended December 31, 1933

Project	*Amount*
Belt Lines, General	$682.73
Belt Line No. 1	1,962.02
Belt Line No. 13, General	1,671.66
Channels, Bridges, and Anchorages	7,179.47
Consolidated Lighterage and Carfloatage Operations	998.45
Food receiving Terminals and Food Distribution	908.44
Development Work, Port District	74,652.85
I. C. C. and State Commission Cases	11,574.51
Inland Terminals and Movement of Freight by Motor Trucks	24,206.27
Suburban Transit	1,393.32
Terminal Operations, General	4,819.56
Traffic Rates and Regulations	8,561.47
Total	$138,610.75

rived by the Port Authority, only 1.8 percent went for these port-development activities in 1932, and only 1.3 percent in 1933.[16] It seems quite plain that the Port Authority cannot acquire immunity merely because this small part of its activities may be said to be governmental in character. Its great bridges and tunnels, and its terminal and commerce building, can in no sense be said to be a "necessary auxiliary" of these minor activities. Indeed, so far as these relate to planning traffic flow and port development, they amount to little more than the planning undertaken by any large enterprise possessed of a profitable and expanding business.

4. The appeal to history does not lead to any necessarily certain result. This is because, throughout the history of our country, bridges have been built and operated both by private and by governmental organizations. In result the Government cannot argue that the Port Authority has entered into a field traditionally reserved to private enterprise. Nor can the respondents argue that the large

[16] In 1932 the gross income was $10,644,702.67 and in 1933 it was $10,371,374.08. If other measures are useful, it may be noted that the expenditures on port development in 1932 were 2.9 per cent of the gross expenditures of $6,611-693.56 and 8.9 per cent of the gross expenditures, less bond interest, of $2,137,318.54. In 1933 they were 2.0 per cent of the gross expenditures of $7,021,684.43 and 6.5 per cent of the gross expenditures, less bond interest, of $2,023,101.09. (Figures derived from income data in 1932 Annual Report, p. 73; 1933 Appeal Report, p. 75.)

revenues derived by the Port Authority are those which arise from the normal and historical operations of government alone.

But measured against the standards which have been suggested by this Court, this historical background becomes somewhat more illuminating. The governmental functions which have been said to warrant tax exemption are those which are *strictly* governmental (*South Carolina* v. *United States,* 199 U. S. 437, 461), *essential* governmental functions *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107, 172; *Brush* v. *Commissioner,* 300 U. S. 352, 362), *usual* governmental functions (*Helvering* v. *Powers,* 293 U. S. 214, 225) and *traditional* governmental functions (*United States* v. *California,* 297 U. S. 175, 185). The most recent description of exempt functions is that given in *Helvering* v. *Therrell,* No. 128, this Term, where the Court said (pamph., p. 4) that "essential government duties" mean:

> those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution.

Certainly, the construction and operation of bridges cannot be said to be "strictly" governmental. Since the Port Authority has operated its bridges and tunnels for only a decade or less, this activity hardly can be said to be "essential" to the independence of New York or New Jersey. And, while the states have "traditionally" built bridges, it

would not be argued that this activity is "traditionally" or "usually" governmental in the sense that private organizations have not undertaken it. And by no means can it be thought that the framers would have considered the states unable "adequately to function under the form of government guaranteed by the Constitution" if the employees of a great revenue-producing enterprise such as the Port Authority were subjected to income taxation.

5. The essentially proprietary nature of the activities of the Port Authority is illustrated by the terms of the port compact itself. Article 8 provides:

> ART. 8. Unless and until otherwise provided, all laws now or hereafter vesting jurisdiction or control in the public service commission, or the public utilities commission, or like body, within each State, respectively, shall apply to railroads and to any transportation, terminal, or other facility owned, operated, leased, or constructed by the port authority, with the same force and effect as if such railroad, or transportation, terminal, or other facility were owned, leased, operated, or constructed by a private corporation.

In addition, as developed more fully below, the location and structure of the bridges, as well as the tolls charged, are subject to the jurisdiction of the Secretary of War under the General Bridge Law of 1906, *infra,* pp. 59–60.

A corporation which is thus subjected to the regulatory powers of the national government, and which is subjected to the state commissions as fully as though the facilities were privately owned and operated, must carry a heavy burden to show that it is entitled to tax immunity because its activities are "essential governmental functions." This burden, we submit, is not met by a legislative declaration in 1931 that the Port Authority "shall be regarded as performing an essential governmental function * * * and shall be required to pay no taxes or assessments" on its property (N. Y., L. 2, 1931, c. 47, Sec. 14; N. J., L. 1931, c. 4, Sec. 14). The implications of the Federal Constitution cannot be shaped by declarations of the legislatures of the states.

6. The nature of the activities of the Port Authority is such that the decision must be governed by *Helvering* v. *Powers, supra.* But perhaps the most decisive element of the case is the large volume of revenues which would be carved out of the field of federal revenue sources if the Port Authority and its employees were held exempt from federal taxation.

Few principles in the field of intergovernmental tax immunity are better settled than that which denies to the states the power to claim tax exemption for activities which would normally be within the scope of the federal taxing power. In *South Carolina* v. *United States,* 199 U. S. 437, the Court

placed its decision squarely on the ground that to grant tax immunity to the state liquor business would be to curtail the ordinary sources of federal revenue. It said (at p. 455):

> Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues.

And in *Helvering* v. *Powers, supra,* p. 225, the Court defined the controlling limitation upon the claim for tax immunity as the principle that "the State cannot withdraw sources of revenue from the Federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend." This Court has repeatedly stressed the necessity that exemption not be granted from nondiscriminatory taxation where the effect would be to cripple the power to tax. *Metcalf and Eddy* v. *Mitchell,* 269 U. S. 514, 523–524; *Willcuts* v. *Bunn,* 282 U. S. 216, 225; *Susquehanna Co.* v. *State Tax Commission (No. 1),* 283 U. S. 291, 294; *United States* v. *California,* 297 U. S. 175, 184–185; *James* v. *Dravo Contracting Co.,* No. 3, this Term (pamph. p. 11). Indeed, in *Helvering* v. *Mountain Producers Corp.,* No. 600, this Term, this Court overruled its decisions in *Gillespie* v. *Oklahoma,* 257 U. S. 501, and *Burnett* v. *Coronado Oil and Gas Co.,* 285 U. S. 393, because, in considerable part, along-

side of the principle of tax immunity was the correlative and "competing principle, buttressed by the most cogent considerations, that the power to tax should not be crippled" by undue extensions of constitutional exemption.

Rarely has a case been presented to this Court which more strikingly illustrated the necessity that the federal tax sources should be maintained. During the taxable years in question, the gross revenues of the Port Authority amounted to $10,270,699.82 in 1932 and to $10,134,638.21 in 1933; by 1937 these revenues had reached the total of $14,050,580.61 (supra, p. 33). As new facilities are opened, the revenues may be expected to increase largely. The volume of the activities of this single Port Authority indicates how serious would be the impact upon the revenues of the Federal Government of a decision of exemption from taxation.

These revenues are gained in competition with private enterprise. It has been stipulated that "the business of the ferry companies operating between the west and east sides of the Hudson River have diminished, and that * * * they will probably continue to diminish * * *. We will freely concede that the furnishing of the vehicular tunnel under the Hudson River, and bridges over the Hudson River, may ultimately result in a complete wiping out of the ferries * * *." (R. 174.) These private ferries were, of course, subject to Federal taxation. While it is probable that one of the

effects of the Port Authority facilities has been to stimulate interstate vehicular traffic, it cannot be denied that a large proportion of its revenues have been drained off from those formerly received by the ferry companies. The record shows that all of these competing ferry companies have been forced to reduce their fares, and that one has been forced out of business entirely (*supra,* pp. 9–12).[17]

7. It is recognized that the Circuit Courts of Appeals for the Second and for the Ninth Circuits have indicated a contrary conclusion. *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515 (C. C. A. 2nd) (Albany Port District); *Commissioner* v. *Harlan,* 80 F. (2d) 660 (C. C. A. 9th) (Golden Gate Bridge and Highway District). Each of these cases may be distinguished on their facts. But the opinions in those cases would seem to cover the present case as well. To that extent, they depart from the guiding principles which have been laid down by this Court.[18]

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[17] Respondents do not deny that a decision that the Port Authority is immune from taxation would result in the loss of the substantial revenues formerly derived from the competing private ferries. They advance, however, the novel argument that the effect of the Port Authority activities "necessarily forwards the general prosperity—and so directly increases federal tax returns (Br. in Opp. 37). This principle, if accepted, would seem to eliminate tax revenues entirely, at least when a government claims immunity for any of its activities. Presumably any productive activity which produces income forwards the general prosperity.

[18] Four other cases in the Board and the lower courts, relating to the taxation of compensation paid employees of

The separate organization of the Port Authority, the fact that its revenues are derived from the sale of transportation service to the general public in competition with private enterprise, and the necessity of maintaining the sources of federal revenue, alike indicate that the Port Authority is not engaged in an essential governmental function. Certainly, to hold the Authority and its employees subject to federal taxation would not serve to destroy that independence of the States of New York and New Jersey which is essential to the maintenance of our dual system of government.

II

THE PORT AUTHORITY IS NOT AN AGENCY CREATED BY THE STATES ALONE

The Port Authority was created by and operates under a compact between the States of New York and New Jersey, which was approved by an Act of Congress (*infra*, p. 71). Without this approval of Congress the compact would have been inoperative and the Port Authority would not have been created. Both the nature of an interstate compact and the terms of the compact in question demonstrate that the Port Authority cannot claim any immunity from federal taxation which might at-

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more or less analogous organizations, by decision or implication tend to support respondents. *Wait* v. *Commissioner*, 35 B. T. A. 359; *Platt* v. *Commissioner*, 35 B. T. A. 472; *Boomer* v. *Glenn*, 21 F. Supp. 766 (Jan. 14, 1938); *Jamestown & Newport Ferry Co.* v. *Commissioner*, 41 F. (2d) 920 (C. C. A. 1st).

tach to its operations were they undertaken by the states themselves.[19]

1. Article 1, Section 10, Clause 3 of the Constitution provides that "no State shall, without the consent of Congress, * * * enter into any agreement or compact with another state." The effect of this provision is, at this point, not wholly clear. But the status of an approved compact seems, for many purposes, most accurately to be described as that of an act of Congress.

The compact clause can be understood only in its historical setting.[20] For more than 325 years there have been colonial or state governments in America. During this long period the colonies or states have been able to enter into agreements without the approval of a central authority for less than

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[19] The memorandum filed in behalf of the Attorney General in *Hinderlider* v. *La Plata River and Cherry Creek Ditch Co.*, No. 437, this Term, also sets forth the view of the government that a compact approved by Congress has the status of an act of Congress. Our argument on the nature of interstate compacts is largely repetitive of the discussion there contained. We repeat it for the possible convenience of the Court. There is, of course, no basis for respondent's suggestion (Br. in Opp. 33) that the memorandum filed on behalf of the United States in *Hinderlider* case means that "the Attorney General retired from the broader position previously taken by him." (See pp. 5–6 of the second memorandum.)

[20] The clause was not discussed in the Constitutional Convention. Each of the successive drafts contains language substantially identical with the compact clause as finally enacted. Farrand, Records of the Federal Convention, II, 169, 187, 577, 597, 626, 657.

two years, the period between the Declaration of Independence on July 4, 1776, and the ratification of the Articles of Confederation on June 26, 1778.

The formal agreements between the American colonies seem to have been confined to those relating to boundary suits. As such, they involved the construction or application of royal charters. It was, therefore, quite natural that agreements between two colonies should be subject to royal approval before they became effective. Accordingly, the common practice [21] in the case of boundary disputes was to refer the agreement to the King for his approval. Thus, the Massachusetts Act of April 19, 1754, ch. 367, 15 Mass. Prov. Laws 157, appointed commissioners to agree upon the New York boundary line, to be followed by acceptance by the legislatures "in order humbly to present the same, after their accepting it, to be approved & ratified by his Majesty;

[21] The New York Act of June 6, 1767, N. Y. Col. Laws 948, designates Commissioners to agree with those of Massachusetts as to the proper boundary and makes no mention of a subsequent approval of the King. This may have been implicitly understood, or subsequent legislation may have been intended to take care of this. Thirteen years before, on December 7, 1754, the Assembly had petitioned for a royal commission to settle another boundary "altho' his most Gracious Majesty hath the Sole and Absolute Right of fixing and Determining Such Line of Jurisdiction." 3 N. Y. Col. Laws 1036. The records of five colonial boundary disputes, summarized in Frankfurter and Landis, A Study in Interstate Adjustments, 34 Yale Law J. 685, 730–732, which apparently contain no approval of the agreement by the King, are possibly incomplete.

or otherwise to agree on a line to be immediately submitted to his Majesty for his Royal Approbation & Confirmation as the Commissioners mutually chosen shall judge best." Other colonial acts are to the same effect.[22] The fact that the alternative mode of procedure was by the direct appointment of a royal commission, followed by an appeal to the King in Privy Council,[23] points the fact that the disputes were considered subject to decision by the King alone. Lord Mansfield, when Attorney General Murray, is quoted in *South Australia* v. *Victoria,* 12 C. L. R. 667, 704, as having stated that the Massachusetts-Connecticut boundary agreement would be binding on the King only if he approved it (Frankfurter and Landis, A Study in

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[22] The Act of April 11, 1729, ch. 281, 11 Mass. Prov. Laws 396, appointing commissioners to agree upon the New Hampshire line provided that, after acceptance by the legislatures, "His Majesty be humbly addressed by both Governments for his Royal Approbation." The Act of Oct. 13, 1730, ch. 134, 11 Mass. Prov. Laws 517, relating to the same boundary dispute, directed the Commissioners to settle the line "that it may be indisputable in all times to come, Upon its receiving the Royal Sanction." See also Frankfurter and Landis, *supra*, p. 692.

[23] See Act of Dec. 7, 1754, 3 N. Y. Col. Laws 1036 (New York-New Jersey), subsequently "repealed by the King," Livingston & Smith, ch. 48, N. Y. Laws, 1752–1762, vol. 2; Act of Sept. 6, 1737, ch. 113, 12 Mass. Prov. Laws 407 (Massachusetts-New Hampshire); Act of July 28, 1741, ch. 27, 13 Mass. Prov. Laws 24 (Massachusetts-Rhode Island); Act of August 1, 1740, 4 R. I. Col. Rec. 586 (same). Batchellor, Laws of N. H., vol. 2, App. B, pp. 768–794, contains the official record of the Massachusetts-New Hampshire dispute.

Interstate Adjustments, 34 Yale Law Journal 685, 692, 693). It thus seems that the colonial agreements were in effect royal decrees.[24]

This colonial practice, forbidding the separate colonies to make agreements between themselves without royal approval was, in the Articles of Confederation, translated into a provision forbidding the separate states to make agreements among themselves.[25] Article 6 provides in part:

> No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

This clause obviously provided the model for the provision in the Federal Constitution, and the constitutional prohibition must accordingly be read in the light of the long history of colonial agreements, the status of which seems to have been continued in the Articles of Confederation.

The decisions of this Court indicate that a compact between States which has been approved by Congress will for many purposes be viewed as an Act of Congress. A compact to which Congress has

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[24] Such, of course, is the theoretical status of an act of Parliament. Blackstone, Commentaries, I, *85; Anson, Law and Custom of the Constitution, p. 34.

[25] There was no discussion of Article 6 relevant to this question. See 9 Journ. Cont. Cong. 826, 827, 833.

consented, "by the sanction of Congress, has become a law of the Union," such that this Court may enforce its terms. *Pennsylvania* v. *The Wheeling Bridge Co.*, 13 How. 518, 566; *Missouri* v. *Illinois*, 200 U. S. 496, 519. Similarly, Congress itself may legislate for the enforcement of a compact which it has approved. *Virginia* v. *West Virginia*, 246 U. S. 565, 601–603; *Pennsylvania* v. *The Wheeling Bridge Co., supra*, 566. This Court has held, after an earlier decision to the contrary,[26] that a compact to which Congress has consented is "a statute of the United States" within the meaning of Section 25 of the Judiciary Act, as amended, giving this Court appellate jurisdiction over cases in which the highest state court has denied a right claimed under such a statute. *Wedding* v. *Meyler*, 192 U. S. 573, 581.

It should be noted that this Court has held that the decisions of a state court under a compact are

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[26] In *People* v. *Central Railroad*, 12 Wall. 455, 456, there was an unequivocal decision that rights claimed under a compact approved by Congress were not claimed under a statute of the United States such as to give this Court jurisdiction. See also *Hamburg American Steamship Co.* v. *Grube*, 196 U. S. 407, 413, where a frivolous claim under a compact approved by Congress was said to raise no Federal question. The *Central Railroad* case has never since been cited and seems necessarily to have been overruled by the *Wedding* case. The possible distinction that the *Wedding* case is based on a Congressional consent to the admission of a State under Article IV, Section 3, clause 1, is unavailing, since the rights claimed under the agreement between Virginia and Kentucky were based on an agreement which this Court has treated as a compact between the States. *Green* v. *Biddle*, 8 Wheat. 1, 85–87.

not binding on this Court, *Marlatt* v. *Silk*, 11 Pet. 1, 22–23, and that a compact is binding on the signatory States, *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 725, such that a state cannot withdraw its consent to a compact which has sufficiently been consented to by Congress, *Virginia* v. *West Virginia*, 11 Wall. 39, cf. *Poole* v. *Fleeger*, 11 Pet. 185, 209–211. Not since *Green* v. *Biddle*, 8 Wheat. 1, 91–93, has this result, placing a compact above ordinary state law, been placed on the contracts clause of the Constitution. Though cf. *Virginia* v. *West Virginia*, 220 U. S. 1, 28–29.

Certainly, it requires the act of Congress to breathe life into the agreement between the states. Before the congressional consent, the proposed compact is wholly nugatory. If congressional action is required to convert what may be said to be tentative or proposed legislation into actual legislation, the resulting act seems more accurately to be called an act of Congress than that of the states alone.

2. Whether or not the Court will agree with us that a compact which has been approved by Congress has the status of an act of Congress, the fact remains that Congress has participated in the legislation by which the Port Authority was created. The compact is plainly something more than joint legislation of the two States. Whether it be called an act of Congress or merely legislation under the authority of the United States is immaterial in the present connection. In either event, or under any

other name, the compact has life only through the participation of Congress. By the express direction of the Constitution, Congress is given absolute and uncontrolled power to determine whether or not the compact shall be effective. The Port Authority was, accordingly, created by a legislative process in which the United States was at least as necessary as were the States of New York and New Jersey. There can, therefore, be no claim that the Constitution by implication gives to the Port Authority immunity from federal taxation in order to maintain its necessary independence of the United States.

The present problem is not essentially different from that which has already been settled by the decisions of this Court. Corporations have occasionally found it useful or necessary to be incorporated by several states. It is established that each of the incorporating states has power to tax the resulting corporation as fully as though it were a purely domestic corporation, and without limitation by the constitutional requirements applicable to corporations not organized by the taxing state. *Kansas City R. R. Co.* v. *Stiles,* 242 U. S. 111, 116–117; *Ashley* v. *Ryan,* 153 U. S. 436, 442; compare *Louisville & Nashville Railroad Co.* v. *Kentucky,* 161 U. S. 677, 703.

So, too, since the Port Authority is incorporated under a compact requiring the legislation of the two States and of Congress, each of legislatures

may be supposed to have the powers of taxation which are applicable to their own corporations.

3. The power of Congress over the Port Authority is recognized by the provisions of the compact itself. It provides (*infra,* pp. 73) in Article III that the Authority shall have "such other and additional powers as shall be conferred upon it by the legislature of either state, concurred in by the legislature of the other, *or by act or acts of Congress* * * *" [italics added]. And the Act of Congress approving the compact provides in Section 2 (*infra,* p. 78), that "the right to alter, amend, or repeal this resolution is hereby expressly reserved."

4. This Court has many times announced the guiding principles which must apply when an immunity from Federal taxation is claimed. The reason for the rule "is found in the necessary protection of the independence of the national and state governments." *Helvering* v. *Powers*, 293 U. S. 214, 225.[26] Since this is the reason for the doctrine of inter-governmental tax immunity, it also marks the limits of the exemption. "Springing from that necessity, it does not extend beyond it." *Board of Trustees* v. *United States,* 289 U. S. 48, 59.[27]

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[26] The principle has similarly been formulated in *National Bank* v. *Commonwealth*, 9 Wall. 353, 362; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 523; *Willcuts* v. *Bunn*, 282 U. S. 216, 225; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 391; *Indian Territory Oil Co.* v. *Board*, 288 U. S. 325, 328; *Board of Trustees* v. *United States*, 289 U. S. 48, 59.

[27] The Court has frequently declared, in similar terms, that the scope of the exemption is limited by its reasons.

If the rule of tax immunity is to be limited to its reasons, it has no application to these respondents. Their compensation is derived from a corporation created by the joint legislation not only of the States of New York and New Jersey but also of the Congress of the United States. By hypothesis, there can be no question of maintaining the necessary independence of the states from the federal government. Accordingly, the Port Authority cannot assert an independence of Congress, which participated in its creation, and cannot claim a constitutional immunity from taxes imposed by Congress.[28]

Respondents' claim to immunity, of course, rises no higher than that of the Port Authority itself. *Helvering* v. *Powers, supra,* 227.

Indian Territory Oil Co. v. *Board, supra,* 328; *Helvering* v. *Powers, supra,* 225; *Willcuts* v. *Bunn, supra,* 225; *Educational Films Corp.* v. *Ward, supra,* 392; *Fox Films Corp.* v. *Doyal,* 286 U. S. 123, 128.

[28] Respondents (Br. in Opp. 33) meet this argument by reliance upon the concept of sovereignty. Whatever be the contours of this concept, it is evident that they do not embrace an organization whose existence stems from Congress as well as the states. To the extent that the participation of Congress in compacts impairs state sovereignty which otherwise would exist, this impairment occurred, or was continued, when the Constitution was adopted.

III

THE PORT AUTHORITY OPERATES IN INTERSTATE COMMERCE, SUBJECT TO THE PARAMOUNT POWER OF CONGRESS

It has been shown that the activities of the Port Authority are predominantly proprietary rather than governmental in character. It has been shown that the circumstances of its creation are such that it cannot assert an immunity from taxation based upon the necessity of maintaining its independence from the Federal Government. There is, finally, a third reason which compels a reversal of the judgment below. The operations of the Port Authority are almost exclusively within the field of interstate commerce. Over this field Congress has paramount and plenary power. The activities of the Port Authority are carried on subject to this power. There can, therefore, be no claim that the Constitution assures the Port Authority an independence of the United States such that even its employees are immune from a nondiscriminatory income tax.

1. The terms of the compact, and of the resolutions by which Congress has consented to it and to the comprehensive plan, each indicate that Congress has in no sense abdicated its authority over the field of interstate commerce in which the Port Authority operates.

The compact in Article XVIII gives to the Port Authority the power to initiate legislation by the

two states. But this power is qualified by recognition of the congressional authority. The Article provides:

> The port authority is hereby authorized to make suitable rules and regulations not inconsistent with the constitution of the United States or of either state, *and subject to the exercise of the power of congress,* for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the legislatures of both states, shall be binding and effective upon all persons and corporations affected thereby. [Italics added.]

The Act of Congress granting consent to the compact (*infra,* p. 71) contains the express proviso "that nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement."

The comprehensive plan, under which the Port Authority operates, was approved by Act of Congress on July 1, 1922 (c. 277, 42 Stat. 822). The Joint Resolution approving the plan provides:

> That, subject always to the approval of the officers and agents of the United States as required by Acts of Congress touching the jurisdiction and control of the United States over the matters, or any part thereof, covered by this resolution, the consent of Congress is hereby given to the supplemental

> agreement between the States of New York and New Jersey * * * covering the comprehensive plan for the development of the port of New York * * *.

Lest there be doubt, the resolution closes with two provisos which make clear that the full authority of Congress is reserved over the interstate operations of the Port Authority. These read:

> *Provided,* That nothing herein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement; *Provided further,* That no bridges, tunnels, or other structures shall be built across, under, or in any of the waters of the United States, and no change shall be made in the navigable capacity or condition of any such waters, until the plans therefor have been approved by the Chief of Engineers and the Secretary of War.

Finally, in Section 2 of the resolution Congress provided "that the right to alter, amend, or repeal this resolution is hereby expressly reserved."

2. The interstate bridges could be constructed only with the consent of Congress. Act of March 3, 1899, *infra,* p. 66. In each of the three Acts granting consent to the construction by the Port Authority of the George Washington, Arthur Kill, and Bayonne bridges, Congress expressly provided that the bridges should be subject to the Act of March 23, 1906, regulating the construction of

bridges over navigable waters. And in each Act Congress conditioned its grant of authority upon the requirement that the bridges be commenced within three years and finished within six (or seven) years. Acts of March 2, 1925, chs. 389–391, 43 Stat. 1094–1095.

Under the terms of the Act of March 23, 1906, *infra,* pp. 68, the Secretary of War and the Chief of Engineers must approve the location and the plans of the bridges (sec. 1). The Secretary of War may at any time prescribe the toll rates (Sec. 5). The Secretary may, after notice and hearing, direct the alteration of the bridge if it be found to be an unreasonable obstruction to navigation, or its removal if the lawful orders of the Secretary or the Chief of Engineers are disobeyed (secs. 4, 5). The Authority must maintain such lights and signals on its bridges as the Secretary of Commerce shall direct (sec. 4). Indeed, under Section 18 of the Act of March 3, 1899 (*infra,* p. 66), Congress, through the Secretary of War, could order the alteration or removal of the Port Authority bridges whenever they obstructed navigation, even though no such power had been reserved by the act granting consent to their erection. *Union Bridge Co.* v. *United States,* 204 U. S. 364; *Louisville Bridge Co.* v. *United States,* 242 U. S. 409, 421. See also, *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53; *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251.

It seems quite plain that the bridges of the Port Authority are completely subject to the paramount Federal authority. Similarly, its interstate tunnels are equally subject to the constitutional power of Congress. *West Chicago Railroad* v. *Chicago,* 201 U. S. 506, 527–528. There can be no doubt that the bus line operated by the Authority over its interstate bridges, and its terminal facilities so far as used for interstate shipments, are fully subject to whatever appropriate control Congress should think necessary in its regulation of interstate commerce. The functions of the Port Authority in planning the development of the Port of New York are, of course, an activity equally subject to the power of Congress. *Wisconsin* v. *Duluth,* 96 U. S. 379, 387; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 634–638.

It results that the Port Authority, in operating so exclusively in the field of interstate commerce, is at all times subject to the paramount power of Congress. "The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on." *Minnesota Rate Cases,* 230 U. S. 352, 399. When this authority was exercised by granting to the Port Authority permission to build its interstate bridges, there was reserved, as we have shown, a continuing power of control to Congress. This Court said of a similar authorization in *Bridge Company* v. *United States,* 105 U. S. 470, 481–482:

> What the company got from Congress was the grant of a franchise, expressly made defeasible at will, to maintain a bridge across one of the great highways of commerce. * * * from the moment of its origin its continued existence was dependent on the will of Congress * * *.

The congressional power is, of course, in no sense qualified by the fact that the Port Authority also acts under authorization from the States of New York and New Jersey. *Union Bridge Co.* v. *United States, supra,* 401; *Philadelphia Co.* v. *Stimson, supra,* 635.

Respondents hardly will deny the scope of the control over the activities of the Port Authority which the Constitution commits to Congress, and which Congress expressly has reserved. Yet they place heavy reliance upon *South Carolina Highway Department* v. *Barnwell Brothers, Inc.,* No. 161, this Term. There this Court sustained the power of the State to regulate the weight and size of the trucks which used its highways in interstate commerce. The Court recurred to the established principle that the State has authority over its own highways, even though the exercise of this power might burden or impede interstate commerce. But every paragraph of the opinion makes clear that this authority of the State is always subject to the powers of Congress.

In this case, we are in no sense denying the power of the states to carry on the activities now accomplished by the Port Authority. We readily

agree that the Port Authority is performing services of great benefit both to the states and to the nation. We readily agree that its activities, in building bridges and in developing the port, are appropriate fields for state action and are sanctioned by long usage. Our point, and one which respondents hardly can dispute, is that this activity is one which at all times remains subject to the full power of Congress.

3. The Government does not argue that a tax upon the income paid by the Port Authority to its employees is, in any sense, an exercise of the power to regulate interstate commerce. It does contend that, since Congress has paramount and plenary authority over almost all of the activities of the Port Authority, the reason for the rule of tax immunity is absent.

We have shown that the basis for the rule of tax immunity is the implication derived from the nature of our Federal system, that the states and the national Government must be protected in their necessary independence each from the other. The decisions of this Court have, similarly, many times announced that tax immunity will not be extended beyond the limits set by the reason for the doctrine. (*Supra,* p. 55.)

The epochal dictum of Chief Justice Marshall, that the power to tax is the power to destroy (*McCulloch* v. *Maryland,* 4 Wheat. 316, 427), was considered by him to be an inexorable constitutional principle because questions of degree were "so unfit

for the judicial department" (p. 430). This Court has long since recognized that neither the premise nor the conclusion of this bold syllogism is to be accepted literally.[29] But even if the great dictum be given its full force, it ascribes to Congress only that power which it already and indisputably has under the commerce clause.

Respondents ask for a purely mechanical application of the doctrine of tax immunity. They seek to have this Court sanction their exemption from taxation upon the highly conjectural ground that a non-discriminatory tax upon their compensation will "burden" the Port Authority such that the independence of the States of New York and New Jersey is threatened to the point that menaces our dual system of government. They must, at the same time, admit that all of the activities of the Port Authority are completely subject to the constitutional power of Congress to control, to supersede, or to forbid them. No decision in the entire field of tax immunity could be more anomalous than a decision that the United States, possessed of the sweeping powers over the activities of the Port Authority which is given by the commerce clause, is nonetheless incompetent to tax the com-

[29] See, in the body of constitutional doctrine relating to intergovernmental tax immunity, *Plummer* v. *Coler*, 178 U. S. 115; *Greiner* v. *Lewellyn*, 258 U. S. 384; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 523; *Willcuts* v. *Bunn*, 282 U. S. 216; *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, 282; *Helvering* v. *Mountain Producers Corp.*, No. 600, this Term.

pensation paid the Port Authority employees because of the fear that such a tax would invade the independence of the States of New York and New Jersey.

CONCLUSION

The activities of the Port of New York Authority are proprietary rather than governmental in nature. The Port Authority has existence only by virtue of a compact approved by Congress, and therefore can claim no independence of the United States. All of its activities are conducted in the field of interstate commerce, over which Congress has paramount power. In the light of these considerations, to hold respondents exempt from a nondiscriminatory income tax would extend the doctrine of intergovernmental tax immunity far beyond its reasons, and far beyond any limit sanctioned by the prior decisions of this Court. It is, therefore, respectfully submitted that the judgment of the court below should be reversed.

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MARCH 1938.

APPENDIX

Act of March 3, 1899 (Rivers and Harbors Act), c. 425, 30 Stat. 1121:

SEC. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War (U. S. C., Title 33, Sec. 401).

SEC. 18. That whenever the Secretary of War shall have good reason to believe that

any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thou-

sand dollars, and every month such persons, corporation or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: *Provided,* That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants.

Act of March 23, 1906 (General Bridge Law of 1906), c. 1130, 34 Stat. 84:

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That when, hereafter, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans, either before or after comple-

tion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War (U. S. C., Title 33, Sec. 491).

SEC. 2. That any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route, upon which no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for the transportation over any railroad, street railway, or public highway leading to said bridge; and the United States shall have the right to construct, maintain, and repair, without any charge therefor, telegraph and telephone lines across and upon said bridge and its approaches; and equal privileges in the use of said bridge and its approaches shall be granted to all telegraph and telephone companies. (U. S. C., Title 33, Sec. 492.)

SEC. 4. That no bridge erected or maintained under the provisions of this Act shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed, and if any bridge erected in accordance with the provisions of this Act shall, in the opinion of the Secretary of War, at any time unreasonably obstruct such navigation, either on account of insufficient height, width of span, or otherwise, or if there be difficulty in passing the draw opening or the drawspan of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the Secretary of War, after giving the parties interested reasonable oppor-

tunity to be heard, to notify the persons owning or controlling such bridge to so alter the same as to render navigation through or under it reasonably free, easy, and unobstructed, stating in such notice the changes required to be made, and prescribing in each case a reasonable time in which to make such changes, and if at the end of the time so specified the changes so required have not been made, the persons owning or controlling such bridge shall be deemed guilty of a violation of this Act; and all such alterations shall be made and all such obstructions shall be removed at the expense of the persons owning or operating said bridge. The persons owning or operating any such bridge shall maintain, at their own expense, such lights and other signals thereon as the Secretary of Commerce and Labor shall prescribe. If the bridge shall be constructed with a draw, then the draw shall be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft. If tolls shall be charged for the transit over any bridge constructed under the provisions of this Act, of engines, cars, street cars, wagons, carriages, vehicles, animals, foot passengers, or other passengers, such tolls shall be reasonable and just, and the Secretary of War may, at any time, and from time to time, prescribe the reasonable rates of toll for such transit over such bridge, and the rates so prescribed shall be the legal rates and shall be the rates demanded and received for such transit. (U. S. C., Title 33, Sec. 494.)

SEC. 8. That the right to alter, amend, or repeal this Act is hereby expressly reserved as to any and all bridges which may be built

in accordance with the provisions of this Act, and the United States shall incur no liability for the alteration, amendment, or repeal thereof to the owner or owners or any other persons interested in any bridge which shall have been constructed in accordance with its provisions. (U. S. C., Title 33, Sec. 498.)

Joint Resolution of August 23, 1921, c. 77, 42 Stat. 174:

Joint Resolution Granting consent of Congress to an agreement or compact entered into between the State of New York and the State of New Jersey for the creation of the Port of New York District and the establishment of the Port of New York Authority for the comprehensive development of the port of New York.

Whereas commissioners duly appointed on the part of the State of New York and commissioners duly appointed on the part of the State of New Jersey for the creation of the Port of New York District and the establishment of the Port of New York Authority for the comprehensive development of the port of New York, pursuant to chapter 154, Laws of New York, 1921, and chapter 151, Laws of New Jersey, 1921, have executed certain articles, which are contained in the following, namely:

Whereas in the year 1834 the States of New York and New Jersey did enter into an agreement fixing and determining the rights and obligations of the two States in and about the waters between the two States, especially in and about the bay of New York and the Hudson River; and

Whereas since that time the commerce of the port of New York has greatly developed

and increased and the territory in and around the port has become commercially one center or district; and

Whereas it is confidently believed that a better coordination of the terminal, transportation, and other facilities of commerce in, about, and through the port of New York will result in great economies, benefiting the Nation as well as the States of New York and New Jersey; and

Whereas the future development of such terminal, transportation, and other facilities of commerce will require the expenditure of large sums of money and the cordial cooperation of the States of New York and New Jersey in the encouragement of the investment of capital and in the formulation and execution of the necessary physical plans; and

Whereas such result can best be accomplished through the cooperation of the two States by and through a joint or common agency: Now, therefore,

The said States of New Jersey and New York do supplement and amend the existing agreement of 1834 in the following respects:

ARTICLE 1. They agree to and pledge, each to the other, faithful cooperation in the future planning and development of the port of New York, holding in high trust for the benefit of the Nation the special blessings and natural advantages thereof.

ART. 2. To that end the two States do agree that there shall be created and they do hereby create a district to be known as the "Port of New York District" (for brevity hereinafter referred to as "the district"), which shall embrace the territory bounded and described as follows:

* * * * *

The boundaries of said district may be changed from time to time by the action of the legislature of either State concurred in by the legislature of the other.

ART. 3. There is hereby created "The Port of New York Authority" (for brevity hereinafter referred to as the "port authority"), which shall be a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislature of either State concurred in by the legislature of the other, or by Act or Acts of Congress, as hereinafter provided.

ART. 4. The port authority shall consist of six commissioners—three resident voters from the State of New York, two of whom shall be resident voters of the city of New York, and three resident voters from the State of New Jersey, two of whom shall be resident voters within the New Jersey portion of the district, the New York members to be chosen by the State of New York and the New Jersey members by the State of New Jersey in the manner and for the terms fixed and determined from time to time by the legislature of each State, respectively, except as herein provided.

Each commissioner may be removed or suspended from office as provided by the law of the State for which he shall be appointed.

ART. 5. The commissioners shall, for the purpose of doing business, constitute a board and may adopt suitable by-laws for its management.

ART. 6. The port authority shall constitute a body, both corporate and politic, with full power and authority to purchase, construct, lease, and/or operate any terminal or transportation facility within said district; and

to make charges for the use thereof; and for any of such purposes to own, hold, lease, and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it. No property now or hereafter vested in or held by either State, or by any county, city, borough, village, township, or other municipality, shall be taken by the port authority, without the authority or consent of such State, county, city, borough, village, township, or other municipality, nor shall anything herein impair or invalidate in any way any bonded indebtedness of such State, county, city, borough, village, township, or other municipality, nor impair the provisions of law regulating the payment into sinking funds of revenues derived from municipal property, or dedicating the revenues derived from any municipal property to a specific purpose.

The powers granted in this article shall not be exercised by the port authority until the legislatures of both States shall have approved of a comprehensive plan for the development of the port as hereinafter provided.

ART. 7. The port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either State concurred in by the legislature of the other. Unless and until otherwise provided, it shall make an annual report to the legislature of both States, setting forth in detail the operations and transactions conducted by it pursuant to this agreement and any legislation thereunder. The port authority shall not pledge the credit of either State except by and with the authority of the legislature thereof.

ART. 8. Unless and until otherwise provided, all laws now or hereafter vesting jurisdiction or control in the public service commission, or the public utilities commission, or like body, within each State, respectively, shall apply to railroads and to any transportation, terminal, or other facility owned, operated, leased, or constructed by the port authority, with the same force and effect as if such railroad, or transportation, terminal, or other facility were owned, leased, operated, or constructed by a private corporation.

ART. 9. Nothing contained in this agreement shall impair the powers of any municipality to develop or improve port and terminal facilities.

ART. 10. The legislatures of the two States, prior to the signing of this agreement, or thereafter as soon as may be practicable, will adopt a plan or plans for the comprehensive development of the port of New York.

ART. 11. The port authority shall from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two States, they shall be binding upon both States with the same force and effect as if incorporated in this agreement.

ART. 12. The port authority may from time to time make recommendations to the legislatures of the two States or to the Congress of the United States, based upon study and analysis, for the better conduct of the commerce passing in and through the port of New York, the increase and improvement of transportation and terminal facilities therein, and the more economical and expeditious handling of such commerce.

ART. 13. The port authority may petition any interstate commerce commission (or like body), public service commission, public utilities commission (or like body), or any other Federal, municipal, State, or local authority, administrative, judicial, or legislative, having jurisdiction in the premises, after the adoption of the comprehensive plan as provided for in article 10 for the adoption and execution of any physical improvement, change in method, rate of transportation, system of handling freight, warehousing, docking, lightering, or transfer of freight, which, in the opinion of the port authority, may be designed to improve or better the handling of commerce in and through said district, or improve terminal and transportation facilities therein. It may intervene in any proceeding affecting the commerce of the port.

ART. 14. The port authority shall elect from its number a chairman, vice chairman, and may appoint such officers and employees as it may require for the performance of its duties, and shall fix and determine their qualifications and duties.

ART. 15. Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two States shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority and approved by the governors of the two States, but each State obligates itself hereunder only to the extent of $100,000 in any one year.

ART. 16. Unless and until otherwise determined by the action of the legislatures of the two States, no action of the port author-

ity shall be binding unless taken at a meeting at which at least two members from each State are present and unless four votes are cast therefor, two from each State. Each State reserves the right hereafter to provide by law for the exercise of a veto power by the governor thereof over any action of any commissioner appointed therefrom.

ART. 17. Unless and until otherwise determined by the action of the legislatures of the two States, the port authority shall not incur any obligations for salaries, office or other administrative expenses, within the provisions of article 15, prior to the making of appropriations adequate to meet the same.

ART. 18. The port authority is hereby authorized to make suitable rules and regulations not inconsistent with the Constitution of the United States or of either State, and subject to the exercise of the power of Congress, for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the legislatures of both States, shall be binding and effective upon all persons and corporations affected thereby.

ART. 19. The two States shall provide penalties for violations of any order, rule, or regulation of the port authority, and for the manner of enforcing the same.

ART. 20. The territorial or boundary lines established by the agreement of 1834, or the jurisdiction of the two States established thereby, shall not be changed except as herein specifically modified.

ART. 21. Either State may, by its legislature, withdraw from this agreement in the event that a plan for the comprehensive development of the port shall not have been adopted by both States on or prior to July

53207—38——6

1, 1923; and when such withdrawal shall have been communicated to the governor of the other State by the State so withdrawing, this agreement shall be thereby abrogated.

* * * * *

And

Whereas the said agreement has been signed and sealed by the commissioners of each State, and has thereby become binding on the two States as provided in the aforesaid acts: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given to the said agreement, and to each and every part and article thereof: *Provided,* That nothing herein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement.

SEC. 2. That the right to alter, amend, or repeal this resolution is hereby expressly reserved.

Approved, August 23, 1921.

Revenue Act of 1932, c. 209, 47 Stat. 169, 178:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on

for gain or profit, or gains or profits and income derived from any source whatever.

Treasury Regulations 77:

ART. 51. *What included in gross income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. * * *

ART. 643. (as amended by T. D. 4787, January 7, 1938, 1938 Int. Rev. Bul., No. 3, p. 6). *Compensation of State officers and employees.*—Compensation received for services rendered to a State is to be included in gross income unless the person receives such compensation from the State as an officer or employee thereof and such compensation is immune from taxation under the Constitution of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1938